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IN THE

Supreme Court of the United States

October Term, 1963

No. 657

In the Matter of the Proceedings pursuant to Section 22 of Article VI of the Constitution of the State of New York in Relation to

MELVIN H. OSTERMAN,
Judge of the Court of Claims of the State of New York,

Petitioner,

—v.—

COURT ON THE JUDICIARY OF THE STATE OF NEW YORK, by BRUCE BROMLEY, ESQ., COUNSEL DESIGNATED BY SAID COURT TO CONDUCT THE PROCEEDINGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT ON THE JUDICIARY OF THE STATE OF NEW YORK

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COURT ON THE JUDICIARY OF THE STATE OF NEW YORK, by BRUCE BROMLEY, ESQ., COUNSEL DESIGNATED BY SAID COURT TO CONDUCT THE PROCEEDINGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT ON THE JUDICIARY OF THE STATE OF NEW YORK

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Melvin H. Osterman, prays that a writ of certiorari issue to review the final order and judgment of the Court on the Judiciary of the State of New York removing petitioner from his public office of judge of the Court of Claims of New York.

Citations to Opinions Below

The majority and concurring opinions of the Court on the Judiciary are not yet reported and are printed as Appendix A hereto, *infra*, pp. 20-29. The original order and judgment of removal, dated October 8, 1963, and the order of amendment thereto, dated November 18, 1963, are printed as Appendix B hereto, *infra*, pp. 30-33.

Jurisdiction

The order and judgment of the Court on the Judiciary of the State of New York was made and entered on October 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

The Court on the Judiciary was established by Article VI, Section 9-a of the New York State Constitution (now Article VI, Section 22). It consists of the Chief Judge and the Senior Associate Judge of the Court of Appeals, and one Appellate Division Justice from each of the four Appellate Divisions. No right of appeal from a determination of the Court on the Judiciary is provided for in New York law. (See N.Y. Const. Art. VI, § 22; see also N.Y. Const. Art. VI, § 3; and N.Y. Civil Practice Law and Rules, §§ 5601, 5602.) Accordingly, it is clear that the Court on the Judiciary is the highest court of the State of New York in which a decision on the issues raised herein could be had. (See, *In re Friedman*, [3d Dept. 1963] 19 A.D. 2d 120; *Cf., Matter of Guardian Life Ins. Co.* v. *Bohlinger*, [1954] 308 N.Y. 174; *Matter of Droege*, [1909] 197 N.Y. 44.)

Questions Presented

1. Whether a state may, consistently with the requirements of the due process of law and equal protection of the laws clauses of the Fourteenth Amendment to the United States Constitution, remove a judge from his public office for "cause" solely upon the ground that he refused, in good faith reliance on his privilege against self-incrimination, to execute a general waiver of immunity in advance of his being asked any questions by a grand jury which called him, and was seeking to indict him.

2. Whether a state may, consistently with the aforesaid due process and equal protection clauses of the Fourteenth Amendment, remove a judge from his public office for "cause" on the sole ground stated above without first explicitly warning him that he could be removed for that reason alone, and giving him a chance to comply.

3. Whether a state may, consistently with the requirements of federal procedural due process, call a public official before a grand jury to answer questions in a criminal inquiry, of which he is the target, not relating to his conduct in office or to his official duties, with the expectation that the official will invoke his privilege against self-incrimination, and thereby provide itself with a ground for his removal without proving any substantive charge, or producing any evidence on its part.

4. Whether the rights guaranteed to every citizen by the Fifth Amendment to the Federal Constitution are protected from incursion, by a state, through the imposition of penalties for failure to subject himself to questions, the answers

to which may subject the citizen to prosecution in the federal or state courts.

Constitutional Provisions and Statutes Involved

This petition raises issues under the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution, which are set forth in Appendix C hereto, *infra*, p. 34.

The state constitutional provisions which are involved are Article I, Section 6, and Article VI, Sections 9 and 22, of the Constitution of the State of New York. These provisions may be found in McKinney's Consolidated Laws of New York Annotated, Book 2, Part 2. Also involved is Section 2447 of the New York Penal Law which is set forth in McKinney's Consolidated Laws of New York Annotated, Book 39, Part 2. These sections are all printed in Appendix C, *infra*, at pp. 34-35.

Statement of the Case

Proceedings in the Court on the Judiciary

This case arose in the Court on the Judiciary of the State of New York. That court removed petitioner from the office of judge of the Court of Claims of the State of New York, pursuant to Section 22 of Article VI of the New York State Constitution. Under that section the Court on the Judiciary is provided with the power to remove the judges and justices of various courts, including judges of the Court of Claims, for "cause."

On May 25, 1963, Charges for Removal were filed against petitioner (Appendix to Brief in Support of Motion for

Judgment of Removal", Charges for Removal, pp. 1a-4a; Appendix D, *infra*, pp. 36-40). Petitioner answered on June 3, 1963 (Appendix D, Answer of Judge Osterman, *infra*, at p. 42).

The charges set forth four grounds for removal. The charge numbered 8(c) alleged that cause existed for the removal of petitioner as follows:

> "[H]e refused to cooperate with and assist the grand jury investigating whether there had been a conspiracy to bribe an official of the State Liquor Authority in that he refused to sign a general waiver of immunity with respect to answers that he might give concerning such conspiracy." (Appendix D, Charges for Removal, *infra*, p. 39.)

Petitioner's answer admitted the facts upon which that charge was based, but put in issue the facts necessary to support the three other charges (Appendix D, Answer of Judge Osterman, *infra*, p. 42).**

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* This appendix, and the appendix which was annexed to the Reply Brief in Support of Motion for Judgment of Removal, are part of the record certified to this Court. They are printed in Appendix D, *infra*, at pp. 30-60.

** The remaining three charges allege that cause exists for petitioner's removal in that:

> "(a) in violation of a statutory prohibition against his doing so, he practiced law after becoming a judge;
>
> (b) he did not tell the truth to Chief Assistant District Attorney Scotti, an official duly authorized to conduct an inquiry into whether there had been a conspiracy to bribe an official of the State Liquor Authority, in that he denied that he continued to deal with State Liquor Authority matters after becoming a judge;
>
> (d) he attempted to obstruct the investigation of whether there had been such a conspiracy by conspiring to remove

[footnote continued on page 6]

Counsel designated by the Court on the Judiciary to conduct the proceedings then moved the court for a judgment of removal solely on charge 8(c) (Appendix D, Notice of Motion for Judgment of Removal, *infra*, pp. 49-50). The other charges remain unheard and untried. The motion for judgment and the cross-motion were decided upon the pleadings, briefs and appendices thereto, submitted by both counsel, and oral argument heard on September 23, 1963. A brief was also submitted on behalf of the petitioner by the New York Civil Liberties Union as *amicus curiae*. On October 8, 1963, the court granted the motion for removal, denied the cross-motion, and made its order and judgment of removal (Appendix B, *infra*, pp. 30-31).

The facts

Petitioner was duly appointed by the Governor of New York, with the advice and consent of the Senate, to the office of judge of the Court of Claims for a term commencing on July 11, 1961, and terminating on July 11, 1970 (Appendix D, Charges for Removal, *infra*, p. 36; Affidavit annexed to Cross-Motion, *infra*, pp. 59-60).

On March 26, 1963, after petitioner had served in his judicial office for almost two years, he was questioned by Alfred J. Scotti, Chief Assistant District Attorney of New York County, who was conducting a grand jury investigation to determine whether there was or had been a conspiracy to bribe a public officer attached to the New York

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[footnote continued from page 5]

from his office and hide the typewriter that his secretary, subject to his direction, had used to write letters dealing with State Liquor Authority matters, knowing that said typewriter might be sought by investigative authorities in connection with said investigation." (Appendix D, Charges for Removal, *infra*, p. 39.)

State Liquor Authority. Mr. Scotti's interrogation, in an interview conducted in the district attorney's office, concerned itself with activities petitioner was suspected of having engaged in on behalf of liquor licensees while he was a lawyer in private practice, before ascending the bench, and also while he was a judge of the Court of Claims (Appendix D, Charges for Removal, *infra*, p. 37; Affidavit in Support of Cross-Motion, *infra*, p. 61; Affidavit of Alfred J. Scotti, *infra*, p. 66). Petitioner, in answer to Mr. Scotti's questions, stated that he had practiced law in relation to State Liquor Authority matters before becoming a judge, but denied that he had continued to deal with State Liquor Authority matters after his accession to the bench. Mr. Scotti indicated disbelief of what petitioner told him.[2] He made it clear that petitioner was suspected of wrongdoing and that petitioner was a target of the investigation and a prospective defendant in a criminal case. He said that he would call petitioner before the grand jury and ask him to sign a "full and general waiver of immunity," which is the usual denomination of a written waiver of privilege against self-incrimination, executed in advance of testifying (Appendix D, Affidavit in Support of Cross-Motion, *infra*, pp. 61-62).

Thereafter, petitioner retained counsel who informed Mr. Scotti that he had advised the judge that the latter was within his constitutional rights in refusing to sign a general waiver of immunity, but that petitioner had executed, and would offer the grand jury, prior to testifying, a waiver of immunity limited to inquiries concerning his official duties and conduct in office, as required by Article I, Section

[2] On November 7, 1963, petitioner was arraigned on a six-count indictment, in the Supreme Court, New York County, charging him with bribery and conspiracy. He pleaded not guilty, and is awaiting trial. (Indictment No. 4318-63, New York County Supreme Court.)

6, of the New York State Constitution. (See, Appendix A, Opinion, *infra*, p. 20.) Mr. Scotti's response was that such a waiver would be unsatisfactory and that he was not concerned with petitioner's conduct on the bench. He insisted upon petitioner's appearance before the grand jury (Appendix D, Affidavit in Support of Cross-Motion, *infra*, p. 62).

On April 15, 1963, petitioner appeared, not pursuant to a subpoena, but at Mr. Scotti's request, before the New York County grand jury. Petitioner was asked, in the jury room, to sign a general waiver of immunity so that any answers he gave before the grand jury could be used against him in the event any criminal proceedings should be instituted against him. He refused to sign the general waiver tendered by the prosecutor but offered instead a waiver of immunity with respect to any questions and answers relating to the conduct of his office and the performance of his official duties (Appendix D, Transcript of the Appearance of Melvin H. Osterman Before a New York County Grand Jury on April 15, 1963, *infra*, pp. 45-48). Mr. Scotti, in rejecting this waiver, stated that he was not interested in the performance of his judicial duties, but wanted to question petitioner about a conspiracy to bribe a State Liquor Authority official. His statement was as follows:

> "Q. Now I want you to know, Judge Osterman, it is not the intention of this grand jury or the district attorney to question you about matters involving the performance of your judicial duties. It is our intention to question you, should you sign a general waiver of immunity, about matters that are related to the investigation that is being conducted before this grand jury, that is, an investigation to determine whether there was in existence a con-

> spiracy to bribe a public officer attached to the State Liquor Authority" (Appendix D, Transcript, *infra*, p. 46).

Petitioner refused to sign the waiver, and the prosecutor excused him without asking him a single question about the subject matter of the inquiry (Appendix D, Transcript, *infra*, pp. 45-48).

When the report of these events was publicized, the Governor sent petitioner a telegram which contained the following language:

> "In view of your refusal to sign a general waiver of immunity, I hereby request you to resign your judicial office. If you are not willing to do so, I will be compelled to request the Chief Judge of the Court of Appeals to convene a court on the judiciary to take appropriate action under Section 22 of Article VI of the State Constitution" (Appendix D, Affidavit in Support of Cross-Motion, *infra*, p. 63).

Petitioner refused to resign. (See, Appendix D, Letter From Counsel for Petitioner to Governor—April 16, 1963, *infra*, pp. 53-56.) The charges and subsequent proceedings resulting in removal followed.

Presentation of the Federal Questions

The federal constitutional questions presented in this petition were first raised by petitioner when his attorney informed the prosecutor that petitioner would refuse to execute a general waiver of immunity in reliance on his right against self-incrimination (Appendix D, Affidavit in Support of Cross-Motion, *infra*, p. 62). They were again raised by petitioner when he appeared before the grand jury (Appendix D, Transcript, *infra*, pp. 45-48), and later

in his attorney's letter to the Governor (Appendix D, Letter, *infra*, p. 54).

Again, these questions were raised in the motion for judgment of removal, and in the cross-motion to dismiss (Brief in Opposition to Motion for Judgment of Removal, and in Support of Cross-Motion to Dismiss Charge, pp. 21-25).

The federal questions were considered and decided by the court; its opinion reads, in part, as follows:

> "It is now settled law that, despite his rights as a citizen to refuse to answer possibly incriminating questions a public officer may be removed from his office for refusing to cooperate in official investigations by producing relevant information to competent authorities. Such an officer is not to be removed because of any inference of guilt arising from his refusal to talk. His fault and wrong is in withholding the truth which government is entitled to expect and receive from him. If this rule is applicable to minor employees such as those removed in Matter of Lerner (2 N Y 2d 355, affd. 357 U.S. 468), Beilan v. Board (357 U.S. 399) and Nelson v. Los Angeles (362 U.S. 1) then it cannot be held inapplicable to high officers of the State. If a lawyer, considered as an officer of the court, can be ousted from office for such a refusal (Matter of Cohen, 7 N.Y. 2d 488, affd. 366 U.S. 468) then for a stronger reason a like penalty should be visited on the holder of a high office in the judicial department itself. Everything said in the Cohen opinions in the New York Court of Appeals and the United States Supreme Court, about the conditions and disabilities which are attached to the office of attorney and on which its tenure depends, applies with greater force to the office of Judge." (Appendix A, *infra*, p. 26).

On November 18, 1963, the Court on the Judiciary amended its order and judgment of October 8, 1963 by adding at the foot thereof a new paragraph which reads as follows:

> "And it is hereby certified that on the presentation and consideration of the motion to remove Melvin H. Osterman from his office as Judge of the Court of Claims of the State of New York and on the cross-motion for dismissal of charge 8-c, there was presented and necessarily passed upon a question under the Constitution of the United States, viz.:
>
> Whether the removal of Judge Osterman by this Court in the circumstances of this case would violate his rights vouchsafed to him by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.
>
> The Court on the Judiciary held that respondent Melvin H. Osterman's constitutional rights were not violated." (Appendix B, p. 33).

Reasons for Granting the Writ

1. This Court has never passed upon the important issue of constitutional law which, as resolved and applied by the court below, penalizes a public official for invoking his privilege against self-incrimination before a grand jury seeking to indict him.

A. The court below relied in part upon this Court's decisions in *Lerner* v. *Casey*, 357 U.S. 486; *Beilan* v. *Board of Education*, 357 U.S. 399; *Nelson and Globe* v. *County of Los Angeles*, 362 U.S. 1; and *Cohen* v. *Hurley*, 366 U.S. 117. The import of *Lerner*, *Beilan* and *Nelson* is that a state may constitutionally discipline a public employee for refusing to answer questions relevant to his employment even though

the refusal is based upon his privilege against self-incrimination. The teaching of *Cohen* is that a state may bar a lawyer from practice for his refusal to answer questions relating to his conduct as a lawyer in a judicial investigation dealing with the fitness of lawyers to practice. That these cases do not foreclose the questions presented herein is clear.

In the case at bar, the petitioner did not refuse to answer a single question relevant to his position on the bench. On the contrary, he offered to waive the conferring upon him of immunity from prosecution, as well as his privilege against self-incrimination, with respect to any inquiries relating to his conduct in office or to the performance of his official duties as judge.

Petitioner did not, as in *Cohen*, appear before a body possessed of supervisory, disciplinary, appointive or removal power over him. He appeared before a grand jury, whose only real interest in him was as a prospective defendant, and whom it suspected of the commission of a crime having nothing to do with his conduct in office. Indeed, the grand jury had no power even to make a report to the public on general conditions, or on the petitioner's conduct; its proper function was to indict or fail to indict. (See, *Wood* v. *Hughes*, [1961], 9 N.Y. 2d 1, 4)

Again, in *Cohen* the lawyer was removed from practice because he had failed to "cooperate" with the inquiry. While in the present case, the charges and decision are couched in terms of petitioner's failure to "cooperate" with the district attorney and the grand jury—apparently in the hope that the *Cohen* decision will be deemed to cover the petitioner's conduct—the facts shown are quite differ-

ent. In *Cohen* the lawyer was asked questions about his practice. He refused to answer them, and claimed his privilege as to each question. In the case at Bar, not a single question on the subject matter of the inquiry was propounded to the petitioner. Accordingly, it seems unreal to speak of lack of "cooperation" on petitioner's part, since that term has logical reference only to the supplying of information sought by the grand jury. Yet, the court below, in assigning its reasons for removal, wrote as follows:

> "Cause for removal of a judge may be found not only in official misconduct but in his taking attitudes and positions which show unfitness for the office and unworthiness of the trust. *Such unfitness and unworthiness is demonstrated by a refusal by a judge sworn to enforce the law to cooperate in any investigation of official corruption*" (Appendix A, *infra*, p. 26). (Italics supplied)

It is clear that the petitioner, as a judge of the Court of Claims, had no duties akin to those of a peace officer, or in any way relating to the trial or determination of issues in criminal cases. His court was concerned solely with the trial of civil claims against the state. (See N. Y. Court of Claims Act, § 9.) The court below, in equating refusal by such an officer to cooperate with a criminal inquiry in New York County, on pain of being deemed "unfit" and "unworthy", we submit, is announcing an arbitrary and discriminatory doctrine—*i.e.*, that every public servant of the state, no matter how far removed he is, by virtue of his prescribed duties, from the enforcement of criminal law, is a sort of reserve police officer, whose services are employable at the will of the prosecutor. Such a doctrine should be reviewed by this Court.

The imposition of a duty to "cooperate", in the context of the facts of this case, is arbitrary and discriminatory for yet another reason, since true "cooperation" can be compelled on the part of any witness who appears before a grand jury, by conferring immunity upon him. If he should thereafter refuse to testify, he can be punished for contempt. (See Section 2447 of the New York Penal Law, and *People* v. *De Feo*, 308 N.Y. 595.)

In short, the word "cooperation" as employed by the court below in this case, is a euphemism for the giving of a confession to complicity in suspected criminal activity which may provide the basis for indictment and prosecution.

Petitioner was apprised of the fact that he was a target of the inquiry and a prospective defendant in a criminal case. He chose, upon advice of counsel, the prudent and constitutionally proper course of refusing to assist, by his own testimony, those who would visit upon him the sanctions of the criminal law. His removal from office was accordingly premised solely upon dissatisfaction with his refusal to destroy himself. The State of New York, we submit, thereby attached an irrational condition to the petitioner's continuance in the office of judge.

B. That the petitioner has been deprived of important and valuable rights by virtue of the state's action is clear. Thus, he was appointed to office for a term which normally would have expired on July 11, 1970. He had state constitutional and statutory rights to that office, and the substantial financial and other emoluments attaching thereto were subject to abrogation only for cause. (See N.Y. Const., Art. 6, §§ 9 and 22; N.Y. Court of Claims Act, §§ 2 and 4.) As a member of the New York State Employees' Pension System, he was entitled to valuable pension rights for him-

self and his wife (Affidavit in Support of Cross-Motion, Appendix D, *infra*, p. 60).

These state constitutional and statutory rights and emoluments, we submit, are entitled to the protection of the due process and equal protection clauses of the Fourteenth Amendment. (See *Torcaso* v. *Watkins*, 367 U.S. 488; *Slochower* v. *Board of Education*, 350 U.S. 551; *Weiman* v. *Updegraff*, 344 U.S. 183.) As such, of course, they cannot be abrogated by the state through the imposition of a condition or qualification which is arbitrary or discriminatory. (See *Konigsberg* v. *State Bar of California*, 353 U.S. 252; *Schware* v. *Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232; *Slochower* v. *Board of Education*, *supra*; *Weiman* v. *Updegraff*, *supra*.)

This Court has consistently granted review in cases in which doubt existed as to the constitutional validity of the requirement by a state that an officer must testify and make disclosures of circumstances relevant to his fitness for his job or office, as a condition of his continuance in public employment. (See *Lerner* v. *Casey*, *supra*; *Beilan* v. *Board of Education*, *supra*; *Nelson and Globe* v. *County of Los Angele* *supra*.) And it went to great pains in the *Cohen* case to show the historical justification for the state's action there, which was the ancient dominion which the Inns of Court exerted over the right to practice. *A fortiori*, it is respectfully submitted, this Court should grant review in the instant case, where the action of the state was not based upon a failure to answer any questions relative to official duties, and where there is lacking any historical basis for the state's imposition of the condition involved herein upon the holding of judicial office.

2. The court below sanctioned procedures which are inconsistent in principle with the decisions of this Court.

It has long been established that even when applying *permissible standards* a state cannot deprive a public employee of his job *in a manner* that contravenes the due process and equal protection clauses of the Fourteenth Amendment. (See *Slochower* v. *Board of Higher Education, supra; Cf. Konigsberg* v. *State Bar of California, supra*; *Schware* v. *Board of Bar Examiners, supra*; *Ullman* v. *United States*, 350 U.S. 422; *Quinn* v. *United States*, 349 U.S. 161; *Weiman* v. *Updegraff, supra; Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123; *Cole* v. *Arkansas*, 333 U.S. 196; *Yick Wo* v. *Hopkins*, 118 U.S. 366.) These cases make it clear that the mandate of due process requires a judicial type of hearing at which the party whose rights are being determined is (a) fully apprised of the charges against him and of the evidence to support those charges; (b) permitted to confront and cross-examine witnesses; and (c) permitted an opportunity to offer evidence in explanation or rebuttal or mitigation.

These cases also indicate that due process of law required, in the case at bar, fair warning that the refusal to testify would result in removal, and a chance to comply before removal could be adjudged.

Consequently, if the state had sought to remove petitioner, without depending upon the circumstance of the grand jury's action, it would have been obliged to make specific charges of official misconduct, to present evidence of its own, and to sustain the burden of proof as to these charges. Finally, the judgment of the Court on the Judiciary would have had to have been made conditional upon

petitioner's failure to comply with that Court's order to waive immunity and testify before the grand jury.

Instead of affording petitioner these constitutionally essential procedures, the state employed a short-cut which effectively deprived him of his right to the due process of law. It invited petitioner to appear before a grand jury which plainly regarded him as a prospective defendant. When he followed the advice of his attorney, and the dictates of prudence, and asserted his privilege against self-incrimination, the Governor and the Court on the Judiciary seized upon such conduct as a substitute for an affirmative demonstration that petitioner had been guilty of professional misconduct, and instituted removal proceedings against him.

Finally, after the court below construed the vague term "cause" to include such conduct, it ordered petitioner's removal without giving him a chance to conform to its ruling.

It is also clear that the state failed to afford petitioner the equal protection of its laws. Firstly, petitioner was denied the protection of a well recognized rule applicable to cases in which a person is called before a grand jury when he is a target of the inquiry. In such circumstances, the highest court of New York has consistently held that such a person's rights are grossly impaired and violated by the mere act of calling him as a witness and swearing him to give evidence against himself; and that he may not, therefore, be penalized for failure to answer questions, or even for giving perjurious answers. (See *People* v. *Laino* [1961], 10 N.Y. 2d 161, 171; *People* v. *Steuding* [1959], 6 N.Y. 2d 214, 216; *People* v. *De Feo* [1955], 308 N.Y. 595,

603; *People* v. *Ferola* [1915], 215 N.Y. 285, 289. See also, *People* v. *Gillette* [1st Dept. 1908], 126 App. Div. 665, 667-668, 670.)

Secondly, petitioner was obviously deprived of the benefit of the law in New York that when a witness, called before a grand jury, invokes his privilege against self-incrimination in good faith, he cannot be penalized for failure to answer unless and until full immunity from prosecution for any crime revealed by his testimony is conferred upon him. (See N.Y. Penal Law, § 2447; *People* v. *Laino*, *supra*; *People* v. *Steuding*, *supra*; *People* v. *De Feo*, *supra*.)

Petitioner is not asking this Court to act as an overseer of a particular result of the procedure established by the State of New York for the removal of judges. What he *is* earnestly seeking is a review in this Court of his removal which resulted from the arbitrary and discriminatory procedures employed by the state, in contravention of his rights under the Fourteenth Amendment.

3. The questions presented are similar to a question involved in *Murphy* v. *Waterfront Commission of New York Harbor*, No. 138, October Term, 1963.

This Court granted certiorari on October 14, 1963, in *Murphy* v. *Waterfront Commission of New York Harbor*, No. 138, October Term, 1963. One question there is whether the petitioner was denied due process of law when he was held in contempt for refusing to testify before the Waterfront Commission of New York Harbor without an assurance of immunity against possible federal prosecution which might have resulted from disclosures in his testimony. In the instant case, petitioner suffered the penalty of removal from office on the sole ground that he refused to waive immunity, in good faith reliance on his privilege

against self-incrimination, in advance of being asked questions, the answers to which might well have exposed him to both state and federal prosecutions.

It is therefore clear that both *Murphy, supra,* and the case at bar have in common the presentation of the important and substantial question of whether, and to what extent, the due process clause of the Fourteenth Amendment requires a state to grant a privilege against self-incrimination to its citizens.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for certiorari should be granted.

Respectfully submitted,

HARRIS B. STEINBERG
Attorney for Petitioner

HARRIS B. STEINBERG
JAY GOLD
Of Counsel

November, 1963.

APPENDIX A

Opinion of the Court on the Judiciary

STATE OF NEW YORK
COURT ON THE JUDICIARY

In the Matter of the Proceeding pursuant to Section 22 of Article VI of the Constitution of the State of New York in Relation to

MELVIN H. OSTERMAN,
Judge of the Court of Claims
of the State of New York.

UNREVISED AND UNCORRECTED. NOT FOR PUBLICATION.

PER CURIAM:

On April 15, 1963, Melvin H. Osterman, a Judge of the Court of Claims of the State of New York, appeared before a New York County Grand Jury which, as he was at that time and place informed and as he had previously been informed, was investigating to determine whether there was or had been a conspiracy to bribe a public officer attached to the New York State Liquor Authority. In the presence of the grand jury Judge Osterman was asked by an assistant district attorney of New York County to sign a general waiver of immunity. He declined to do so and stated that he was willing to sign a form of waiver which he produced at the grand jury hearing and which, being of the kind referred to in article I, section 6, of the New York State Constitution, would waive immunity with respect to such questions only as should be related to the

performance of his judicial duties. The prosecutor informed the Judge that the former desired to question the latter not about the performance of any judicial duties but as to a conspiracy to bribe a State Liquor Authority official. Judge Osterman still refused to sign the general waiver and was thereupon excused by the assistant district attorney from further attendance before the grand jury.

When the occurrence described in the paragraph above came to the attention of the Governor of the State of New York, the latter by telegram to Judge Osterman demanded that he resign his judicial office, notifying him that if he did not do so, the Governor would request the convening of a Court on the Judiciary pursuant to article VI, section 22, of the State Constitution. Judge Osterman by letter from his counsel refused to resign, listing several reasons including a statement that the Judge was apparently an "object or target" of the investigation and that it was therefore a violation of his constitutional rights to call him before the grand jury except to question him as to his official conduct in office, citing article I, section 6, of the State Constitution. On receipt of counsel's letter the Governor, within his powers as described in article VI, section 22) of the State Constitution, requested that a Court on the Judiciary be convened. It was so convened and the court appointed counsel to conduct the proceedings. Such counsel drew up and presented to the Court on the Judiciary as written charges and causes for his removal, allegations that Judge Osterman had refused to sign a general waiver as above described, also that he had obstructed the grand jury investigation not only by refusing to sign the general waiver of immunity but in other described

ways, and that he had illegally practiced law after becoming a Judge and had lied to the assistant district attorney when he denied that he had continued to deal with State Liquor Authority matters after becoming a Judge. On receipt of these charges from its designated attorney, the Court on the Judiciary pursuant to its rules made a preliminary determination that the charges alleged facts sufficient if proven to constitute cause for removal of Judge Osterman:

By reason of the subsequent proceedings about to be described there is before the Court on the Judiciary at this time and passed on in this order and judgment one charge only, that is, the charge summarized in paragraph numbered 8-c and hereinafter called charge number 8-c which alleges a refusal, by refusing to sign a general immunity waiver, to cooperate with and assist the grand jury's investigation into an alleged conspiracy to bribe a State Liquor Authority official. The other charges served on Judge Osterman, that is, those mentioned in paragraphs numbered 8-a, 8-b and 8-d, are reserved by the court for future disposition.

The answer filed to the charges admits that in March 1963, three weeks before the grand jury appearance of Judge Osterman, he had been asked by the assistant prosecutor in a conversation at the latter's office whether he (the Judge) had continued after he became a Judge to deal with State Liquor Authority matters and as to whether in July 1962 while he was a Judge he had discussed with the State Liquor Authority chairman a difficulty Bermuda Sales Corporation was having with the State Liquor

Authority. The answer admitted that he (the Judge) had denied in that conversation that he had so dealt with or discussed any such matters. The answer admitted also that on his appearance before the grand jury Judge Osterman had been informed by the assistant district attorney that he had been requested to appear before the grand jury "in connection with an investigation to determine whether there was in existence a conspiracy to commit the crimes of bribery of a public officer attached to the State Liquor Authority". The answer further admitted that the Judge had been asked to and had refused to sign a general waiver of immunity and that when he offered to waive immunity as to questions relating to his judicial service only, he had been informed that the prosecutor's desire was to question him not about the performance of his judicial duties but as to a conspiracy to bribe a State Liquor Authority official. In addition to the pleadings we have a written stipulation signed by counsel on both sides and putting before the court an accurate transcript of the grand jury proceedings heretofore described.

On the pleadings and the stipulation above referred to, counsel designated to conduct the proceedings moved the court for a judgment of removal from office on charge 8-c. Counsel for Judge Osterman cross-moved to dismiss that charge. On the oral argument it was conceded that when Judge Osterman came before the grand jury it and the prosecutor were in good faith investigating into alleged public corruption related to the State Liquor Authority, that they sought in good faith to question the Judge in connection with that inquiry, and that Judge Osterman on that and on a previous occasion was informed that such

was the purpose of the questions the prosecutor wished to ask him, also that the Judge knew when he came before the grand jury that the alleged matters about which it was desired to question him were as of the period during which he was a Judge.

The question, therefore, to be answered by the court on these motions is this: is a Judge of a high court of the State guilty of wrong-doing amounting to cause for removal when he refuses to cooperate in an investigation of alleged corruption in a State agency except on condition that he be given immunity from prosecution for any crimes of his own disclosed by his answers? The issue can fairly be so stated since, although Judge Osterman offered to waive as to questions about his judicial conduct, he had been plainly told that the intent and purpose was to question him not as to such conduct but as to corruption in a named State agency. We do not have a situation where a Judge is, without such notification and without any knowledge or notice as to the subject matter under inquiry, requested to sign a general immunity waiver. We express no opinion as to a Judge's rights and duties in such a situation. Our sole question is as to whether a Judge can remain on the bench after he has refused to cooperate with a good faith investigation by a competent official body into alleged corruption in another branch of the government of the State of which he is a high judicial officer. Our answer must be and is that he cannot so continue to remain on the bench and that his obstruction of the grand jury inquiry is cause for his removal within the meaning of article VI, section 22, New York State Constitution.

We reject the contention that article 1, section 6, of the New York State Constitution is the whole law of the subject and absolves a Judge from any blame or penalty provided he signs the limited waiver therein described. Article 1, section 6, effective since 1938 (long before Judge Osterman was appointed) and applicable to all public officers including judges, mandates removal from office for any refusal when called before a grand jury to sign an immunity waiver or answer questions "concerning the conduct of his office or the performance of his official duties * * *." That does not say or mean that a Judge who satisfies that minimum requirement is safe from any charge or penalty.

Judges are subject to another constitutional provision —article VI, section 22—under which the present proceedings are taken. Made effective in 1948, this amendment set up a new tribunal for the trial of charges against Judges only and authorized their removal after trial for "cause". Removal of Judges for "cause" by impeachment has been authorized by our successive State Constitutions for more than a century. The setting up of Courts on the Judiciary is the modern way of deciding as to "cause" for the removal of a Judge. "Cause" is an inclusive, not a narrowly limited, term. Such "cause" may be directly associated with the Judge's work as a Judge but it is not limited to such matters (see *Matter of Friedman*, 12 N Y 2d). It follows that neither article I, section 6, nor *People* v. *Doyle* (1 N Y 2d 722) controls the present case.

Public officers including Judges may claim all the rights available to other citizens, including the right to claim

immunity and refuse to waive it. It does not follow, however, that a Judge after successfully asserting such a right may claim another right to remain in his judicial office. It is now settled law that, despite his rights as a citizen to refuse to answer possibly incriminating questions a public officer may be removed from his office for refusing to cooperate in official investigations by producing relevant information to competent authorities. Such an officer is not to be removed because of any inference of guilt arising from his refusal to talk. His fault and wrong is in withholding the truth which government is entitled to expect and receive from him. If this rule is applicable to minor employees such as those removed in Matter of Lerner (2 N Y 2d 355, affd. 357 U. S. 468), Beilan v. Board (357 U. S. 399) and Nelson v. Los Angeles (362 U. S. 1) then it cannot be held inapplicable to high officers of the State. If a lawyer, considered as an officer of the court, can be ousted from office for such a refusal (Matter of Cohen, 7 N Y 2d 488, affd. 366 U. S. 468) then for a stronger reason a like penalty should be visited on the holder of a high office in the judicial department itself. Everything said in the Cohen opinions in the New York Court of Appeals and the United States Supreme Court, about the conditions and disabilities which are attached to the office of attorney and on which its tenure depends, applies with greater force to the office of Judge. "Cause" for removal of a Judge may be found not only in official misconduct but in his taking attitudes and positions which show unfitness for the office and unworthiness of the trust. Such unfitness and unworthiness is demonstrated by a refusal by a Judge sworn to enforce law to cooperate in any investigation of official corruption.

The motion for removal on charge numbered 8-c should be granted. The cross motion to dismiss the charge should be denied.

Melvin N. Osterman should be removed as of this date from the office of Judge of the Court of Claims of the State of New York.

Botein, J. (concurring):

If charge 8-c depended entirely on the naked stipulation that Judge Osterman, while the target of an investigation into official corruption launched in good faith by the district attorney, had refused to sign a general waiver of immunity, I would vote to dismiss that charge.

In this State judges may be removed by the Legislature and removal proceedings may be initiated by the Governor or Legislature, both representing other arms of government. Some judges may be haled before a grand jury by district attorneys who appear before them regularly as attorneys in adversary criminal actions, who may be resentful and not as fair and scrupulous as the district attorney conducting the investigation involved in this proceeding. I need not dilate upon how critically the judicial arm of our great governing triumvirate might be weakened if judges, of all persons, were deprived of the pattern of protection afforded by the due process, privileges and immunity clauses of the Federal Constitution, and which are so reassuring and fortifying to other citizens.

Judge Osterman, therefore, as was said in Matter of Cohen (7 N Y 2d 488, at p. 495), "as a citizen could not be denied any of the common rights of citizens". The

court then went on to say of Cohen, however, that "he stood before the inquiry * * * in another quite different capacity, also". It is clear that both the Court of Appeals and the United States Supreme Court, in affirming, held that Cohen could be disbarred not for asserting his rights and privileges as a citizen but for his refusal to fulfill his responsibilities as a lawyer to his profession and to the court.

Upon the rationale of the Cohen decision (affd. sub. nom. Cohen v. Hurley, 366 U. S. 117), therefore, I believe that Judge Osterman when appearing before the grand jury stood in a quite different capacity than would Melvin Osterman as a private citizen. As so clearly indicated in the majority opinion, he refused to cooperate with a large scale, good faith investigation into alleged widespread corruption in an important State organization. He had previously been informed of the scope and nature of the matters on which the grand jury sought to examine him. It is evident he was in a position to contribute importantly to the grand jury's inquiry—to an extent involving his alleged dealings with the chairman of the State agency. He nevertheless seditiously evaded the cooperation he should have proffered, as set forth in the majority opinion, by tendering a waiver of immunity restricted to an area in which he knew the grand jury had no interest—namely, the performance of his judicial duties.

I cannot hold with the majority that refusal by a judge to sign a general waiver of immunity or to cooperate in *any* investigation of official corruption warrants his removal. I do believe, however, that where, as here, in good faith a prosecutor is convinced a judge is so profoundly

involved in so extensive an investigation of official corruption, the Cohen decisions (*supra*) mandate that Judge Osterman was required to cooperate to the extent requested by the district attorney.

I therefore concur and vote for Judge Osterman's removal on the aforementioned ground of non-cooperation.

* * * * *

Motion for judgment of removal granted.

Cross motion to dismiss charge 8-c denied.

Opinion Per Curiam. All concur except Botein, J., who concurs in a separate opinion.

APPENDIX B

Order of Removal

STATE OF NEW YORK

COURT ON THE JUDICIARY

At a Court on the Judiciary for the State of New York held at Court of Appeals Hall, Albany, on the eighth day of October A. D. 1963.

Present:

HON. CHARLES S. DESMOND, *Presiding*
HON. MARVIN R. DYE
HON. BERNARD BOTEIN
HON. HENRY L. UGHETTA
HON. JAMES GIBSON
HON. HARRY D. GOLDMAN

In the Matter of the Proceedings pursuant to Section 22 of Article VI of the Constitution of the State of New York in Relation to

MELVIN H. OSTERMAN
Judge of the Court of Claims of the State of New York

This Court having been convened pursuant to Article VI, Section 22 of the Constitution upon the request of Governor Nelson A. Rockefeller and thereafter charges having been served upon Melvin H. Osterman, the respondent, including the charge numbered 8-c reading as follows:

"He refused to cooperate with and assist the grand jury investigating whether there has been a conspiracy to bribe an official of the State Liquor Authority in that he refused to sign a general waiver of immunity with respect to answers that he might give concerning such conspiracy."

and the respondent's answer having been filed; and counsel for the respondent and counsel designated to conduct the proceeding having stipulated a record herein limited to the motions and a motion having been made herein by counsel designated to conduct the proceeding herein for judgment of removal under charge 8-c and a cross-motion having been made here upon the part of the respondent to dismiss charge 8-c as insufficient; now, after hearing Bruce Bromley, Esq., in support of the motion and Harris B. Steinberg, Esq., for the cross-motion and upon the Per Curiam opinion herein, due deliberation having been had, it is

ORDERED that the motion for removal be and the same hereby is granted, and it is

FURTHER ORDERED that the cross-motion to dismiss charge 8-c be and the same hereby is denied and it is

FURTHER ORDERED AND ADJUDGED that said Melvin H. Osterman be and he hereby is removed from his office as Judge of the Court of Claims of the State of New York as of this date.

A copy

RAYMOND J. CANNON
Clerk

(SEAL)

Appendix B.

Order Amending Order of Removal

STATE OF NEW YORK
COURT ON THE JUDICIARY

At a Court on the Judiciary for the State of New York on the eighteenth day of November A. D. 1963.

Present:

HON. CHARLES S. DESMOND, *Presiding*
HON. MARVIN R. DYE
HON. BERNARD BOTEIN
HON. HENRY L. UGHETTA
HON. JAMES GIBSON
HON. HARRY D. GOLDMAN

In the Matter of the Proceedings pursuant to Section 22 of Article VI of the Constitution of the State of New York in Relation to
MELVIN H. OSTERMAN
Judge of the Court of Claims of the State of New York

This Court having removed Melvin H. Osterman from his office as Judge of the Court of Claims of the State of New York by order dated October 8, 1963 and thereafter, Harris B. Steinberg, Esq., counsel for said Melvin H. Osterman having applied for amendment of said order of removal to show that a Federal question was involved and Bruce Bromley, Esq., and Frederick A. O. Schwarz, Esq., Counsel

Designated to conduct the proceeding having consented to such amendment, now therefore, after due deliberation, it is

ORDERED that said application be and the same hereby is granted and the order of removal of this court entered October 8, 1963 be and the same hereby is amended at the foot thereof by adding a new paragraph to read as follows:

> "And it is hereby certified that on the presentation and consideration of the motion to remove Melvin H. Osterman from his office as Judge of the Court of Claims of the State of New York and on the cross-motion for dismissal of charge 8-c, there was presented and necessarily passed upon a question under the Constitution of the United States, viz.:
>
> 'Whether the removal of Judge Osterman by this Court in the circumstances of this case would violate his rights vouchsafed to him by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.
>
> The Court on the Judiciary held that respondent Melvin H. Osterman's constitutional rights were not violated."

A copy

RAYMOND J. CANNON
Clerk

(SEAL)

APPENDIX C

Constitutional Provisions and Statutes

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

"Section 1 . . . ; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTION OF THE STATE OF NEW YORK

ARTICLE I, SECTION 6

"No person . . . ; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general."

ARTICLE VI, SECTION 22

"a Any judge of . . . the Court of Claims . . .

may be removed for cause . . . after due notice and hearing by a court on the judiciary."

NEW YORK PENAL LAW

SECTION 2447

"1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

* * * * *

3. "Competent authority" as used in this section, means: * * *

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

* * * * *

4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

APPENDIX D

Charges for Removal

STATE OF NEW YORK

COURT ON THE JUDICIARY

In the Matter of the Proceedings pursuant to Section 22 of Article VI of the Constitution of the State of New York in Relation to

MELVIN H. OSTERMAN, Judge of the Court of Claims of the State of New York

---

CHARGES FOR REMOVAL

1. MELVIN H. OSTERMAN (hereinafter called Judge Osterman) was appointed by the Governor of the State of New York as a judge of the Court of Claims of the State of New York on July 11, 1961, during a recess of the Senate of the State of New York. On January 11, 1962, the Senate consented to his appointment for a term to expire on July 11, 1970.

2. The Court of Claims is a court of record of statewide jurisdiction which is empowered to determine claims against the State of New York for the appropriation of property, for breach of contract, for torts of its officers and employees and for certain other matters, and to determine counterclaims by the State against claimants.

3. During his term of office as a judge of the Court of Claims, Judge Osterman has practiced the profession of

law, contrary to the prohibition against his doing so contained in the Court of Claims Act, by assisting persons in their legal dealings with the New York State Liquor Authority (hereinafter called the State Liquor Authority).

4. On March 26, 1963, Judge Osterman went to the office of Alfred J. Scotti, the Chief Assistant District Attorney of New York County (hereinafter called Chief Assistant District Attorney Scotti), who was conducting and was duly authorized to conduct a grand jury investigation to determine whether crimes had been committed in connection with the administration of the New York State Liquor Authority. Judge Osterman, in answer to Chief Assistant District Attorney Scotti's questions, stated that he had practiced law in relation to State Liquor Authority matters before becoming a judge but denied that he had continued to deal with State Liquor Authority matters after his accession to the bench. He denied that in July 1962, he had discussed with the then Chairman of the State Liquor Authority, Martin C. Epstein, the difficulties the Bermuda Sales Corporation, operating Bermuda Wines & Spirits at 31 East 72nd Street, New York, New York, was having with the State Liquor Authority with respect to its liquor license.

5. Chief Assistant District Attorney Scotti thereupon told Judge Osterman that there was evidence to contradict Judge Osterman's denials and that if Judge Osterman repeated the denials referred to in paragraph 4 herein under oath before the grand jury investigating the State Liquor Authority he would face indictment for perjury.

6. On April 15, 1963, Judge Osterman appeared, not pursuant to a subpoena, before a quorum of a grand jury of New York County which had been convened on December 4, 1962. He was told by Chief Assistant District Attorney Scotti that he had been requested to appear before the grand jury "in connection with an investigation to determine whether there was in existence a conspiracy to commit the crimes of bribery of a public officer attached to the State Liquor Authority." Judge Osterman was asked by Chief Assistant District Attorney Scotti to sign a general waiver of immunity so that any answers he gave before the grand jury could be used against him in the event a criminal proceeding should be instituted against him. He refused to sign such a waiver and stated that he was only willing to sign a waiver of immunity with respect to answers to questions that involved performance of his judicial duties. Chief Assistant District Attorney Scotti stated that he wanted to question Judge Osterman about a conspiracy to bribe a State Liquor Authority official and not about the performance of his judicial duties and excused Judge Osterman.

7. Judge Osterman attempted to obstruct the investigation of whether there had been a conspiracy to bribe an official of the State Liquor Authority by conspiring with his secretary, Grace O'Shaughnessy, to remove from his office a typewriter on which, subject to his direction, she had typed letters dealing with State Liquor Authority matters and to hide said typewriter in her apartment knowing that said typewriter might be sought by investigative authorities in connection with said investigation.

Appendix D—Charges for Removal

8. Cause exists for the removal of Melvin H. Osterman as a judge of the Court of Claims in that:

(a) in violation of a statutory prohibition against his doing so, he practiced law after becoming a judge;

(b) he did not tell the truth to Chief Assistant District Attorney Scotti, an official duly authorized to conduct an inquiry into whether there had been a conspiracy to bribe an official of the State Liquor Authority, in that he denied that he continued to deal with State Liquor Authority matters after becoming a judge;

(c) he refused to cooperate with and assist the grand jury investigating whether there had been a conspiracy to bribe an official of the State Liquor Authority in that he refused to sign a general waiver of immunity with respect to answers that he might give concerning such conspiracy; and

(d) he attempted to obstruct the investigation of whether there had been such a conspiracy by conspiring to remove from his office and hide the typewriter that his secretary, subject to his direction, had used to write letters dealing with State Liquor Authority matters, knowing that said typewriter might be sought by investigative authorities in connection with said investigation.

Appendix D—Charges for Removal

May 25, 1963.

BRUCE BROMLEY
Bruce Bromley
Counsel Designated To Conduct
The Proceeding
1 Chase Manhattan Plaza
New York 5, N. Y.

Frederick A. O. Schwarz, Jr.
Assistant Counsel

Appendix D

Preliminary Determination Court on the Judiciary, State of New York—May 25, 1963

STATE OF NEW YORK

COURT ON THE JUDICIARY

In the Matter of the Proceedings pursuant to Section 22 of Article VI of the Constitution of the State of New York in Relation to

MELVIN H. OSTERMAN, Judge of the Court of Claims of the State of New York

---

The Court on the Judiciary pursuant to Rule V of its Rules has determined preliminarily that the foregoing Charges for Removal states facts sufficient to constitute cause for the removal of Melvin H. Osterman, Judge of the Court of Claims, and that the foregoing Charges for Removal contains allegations of fact in a form fairly permitting an answer by him and has directed that a copy thereof be served on him with the opportunnity to answer within 20 days after such service upon him, exclusive of the day of service. Trial shall be held at the Court of Appeals Hall in the City of Albany on August 6, 1963, or as soon thereafter as the proceedings may be heard.

Dated: May 25, 1963

CHARLES S. DESMOND
Charles S. Desmond, Presiding Judge
Court on the Judiciary

Appendix D

Answer of Judge Osterman—June 3, 1963

STATE OF NEW YORK

COURT ON THE JUDICIARY

In the Matter of the Proceedings pursuant to Section 22 of Article VI of the Constitution of the State of New York in Relation to

MELVIN H. OSTERMAN, Judge of the Court of Claims of the State of New York

---

Answer of JUDGE OSTERMAN

MELVIN H. OSTERMAN, by his attorney, Harris B. Steinberg, for his answer to the charges for removal herein, alleges as follows:

1. Admits each and every allegation contained in paragraphs 1, 2, 4, 5 and 6 thereof.

2. Denies each and every allegation contained in paragraphs 3, 7 and 8 thereof.

WHEREFORE, MELVIN H. OSTERMAN respectfully prays that an order be made and entered dismissing the proceeding.

Dated: June 3, 1963.

HARRIS B. STEINBERG
Harris B. Steinberg
Counsel for Melvin H. Osterman
25 Broad Street
New York 4, N. Y.

Appendix D

Stipulation Between Counsel Designated to Conduct the Proceeding and Counsel for Melvin H. Osterman —September 9, 1963

STATE OF NEW YORK

COURT ON THE JUDICIARY

In the Matter of the Proceeding pursuant to Section 22 of Article VI of the Constitution of the State of New York in Relation to

MELVIN H. OSTERMAN, Judge of the Court of Claims of the State of New York

STIPULATION

IT IS HEREBY STIPULATED AND AGREED THAT

(1) the hearing before the Court on the Judiciary on September 23, 1963, will be limited, subject to the approval of the Court, to the question whether Judge Melvin H. Osterman should be removed from office on the ground described in paragraph 8(c) of the Charges for Removal filed on May 25, 1963; and

(2) the excerpt of the transcript of the April 15, 1963 session of The Fourth December 1962 Grand Jury, which is attached hereto, is an accurate transcript of the appearance of Melvin H. Osterman before that Grand Jury on that date.

Appendix D—Stipulation Between Counsel Designated to Conduct the Proceeding and Counsel for Melvin H. Osterman—September 9, 1963

Dated: New York, New York
September 9, 1963

BRUCE BROMLEY
Counsel Designated to Conduct the Proceeding,
1 Chase Manhattan Plaza,
New York 5, N. Y.

HARRIS B. STEINBERG
Counsel for Melvin H. Osterman
25 Broad Street
New York 4, N. Y.

Appendix D

Transcript of the Appearance of Melvin H. Osterman Before a New York County Grand Jury on April 15, 1963

April 15, 1963.

PEOPLE v. JOHN ROE, et al.
Before

A QUORUM OF THE FOURTH DECEMBER 1962
GRAND JURY

Presented by
ALFRED J. SCOTTI, Esq.
Chief Assistant District Attorney

JEREMIAH B. MCKENNA, Esq.
DAVID A. GOLDSTEIN, Esq.
MARTIN J. HENEGHAN, Esq.
Assistant District Attorneys

MELVIN H. OSTERMAN, appeared as a witness, not being sworn, stated as follows:

By Mr. Scotti:

Q. Judge Melvin Osterman, I sometime ago had requested you to appear before this grand jury. Now, I want you to know that there has been conducted before this grand jury an investigation to determine whether violations of the penal law have been committed in connection with the administration of the State Liquor Authority. You have been requested to appear before this grand jury specifically in connection with an investigation to determine whether there was in existence a conspiracy to commit the crimes of bribery of a public officer attached to the State Liquor

Appendix D—Transcript of the Appearance of Melvin H. Osterman Before a New York County Grand Jury on April 15, 1963

Authority. Are you willing to sign a waiver of immunity? A. I have prepared and have signed and executed a waiver of immunity which I have here.

Q. Now, I offer you a general waiver of immunity, which means that anything—or rather, ask you to sign a general waiver of immunity, which means that anything you say before this grand jury can be used against you in the event a criminal proceeding should be instituted against you. Are you willing to sign that kind of a waiver of immunity? A. No. I will sign the—I will offer the waiver of immunity which I have signed and executed.

Q. You appreciate that's what they call a limited waiver of immunity? A. That's correct, sir.

Q. Well now, under that kind of a waiver, you only waive immunity with respect to those matters that involve the performance of your judicial duties? A. Correct, sir.

Q. Now I want you to know, Judge Osterman, it is not the intention of this grand jury or the district attorney to question you about matters involving the performance of your judicial duties. It is our intention to question you, should you sign a general waiver of immunity, about matters that are related to the investigation that is being conducted before this grand jury, that is, an investigation to determine whether there was in existence a conspiracy to bribe a public officer attached to the State Liquor Authority.

Now I ask you again, are you willing to sign such waiver of immunity that will cause you to waive immunity with respect to everything you should testify to before this grand jury, if yiu (sic) should testify? A. This is the waiver that I am willing to submit.

Appendix D—Transcript of the Appearance of Melvin H. Osterman Before a New York County Grand Jury on April 15, 1963

Q. In other words, are you saying in effect, Judge Osterman, that you want immunity with respect to those matters that are not related to the performance of your judicial duties? That would be the effect, wouldn't it? A. That is not for me to say, Mr. Scotti. What I am saying is—

Q. All right, go ahead. A. What I am saying is that I have signed and executed—

Q. A limited waiver of immunity. A. Limited, as you say, which I am willing to offer.

Q. You mean limited to the performance of your judicial duties? A. Right, sir.

Q. And you appreciate the effect of that, do you not, Judge, that anything else you testify to would not be covered by this immunity by this waiver, so that being the case we'd have to excuse you, because it is not the intention of the district attorney to request the grand jury to confer immunity upon you. A. Would you want to mark this?

Q. That's right. Is this what you have:

> "I, Melvin H. Osterman, residing at 51 West 86th Street, New York, N. Y., hereby waive immunity and my privilege granted to me under Article I, Section 3 [sic], of the New York Constitution, in the above entitled inquiry, insofar as it concerns the conduct of my present office of Judge of the Court of Claims of the State of New York, or of any public office held by me within five years prior to the date hereof, or the performance of my official duties in any such present or prior offices, and I agree to answer any relevant questions concerning such matters before such grand jury under this waiver of immunity and privilege.

Appendix D—Transcript of the Appearance of Melvin H. Osterman Before a New York County Grand Jury on April 15, 1963

> "This waiver of immunity and privilege is expressly limited so that I am waiving only the immunity and privilege required of me as a public officer pursuant to the aforesaid Article I, Section 5 [sic] of the State Constitution."

All right then, since it is not our intention, or the intention of the grand jury, or the district attorney to have immunity conferred upon you with respect to matters that are related to the investigation that's being conducted before this grand jury, you are excused.

(WITNESS EXCUSED)

Appendix D

Notice of Motion for Judgment of Removal —September 9, 1963

STATE OF NEW YORK

COURT ON THE JUDICIARY

In the Matter of the Proceeding pursuant to Section 22 of Article VI of the Constitution of the State of New York in Relation to

MELVIN H. OSTERMAN, Judge of the Court of Claims of the State of New York

---

NOTICE OF MOTION FOR JUDGMENT OF REMOVAL

SIRS:

PLEASE TAKE NOTICE that the undersigned will move this Court on September 23, 1963, for a judgment removing Melvin H. Osterman from his office as Judge of the Court of Claims of the State of New York for cause on the grounds stated in paragraph 8(c) of the Charges for Removal dated May 25, 1963.

Dated New York, New York
September 9, 1963

BRUCE BROMLEY
Counsel Designated to Conduct
the Proceeding,
1 Chase Manhattan Plaza,
New York 5, N. Y.

Appendix D—Notice of Motion for Judgment of Removal —September 9, 1963

To:

HARRIS B. STEINBERG, ESQ.,
Counsel for Melvin H. Osterman,
25 Broad Street,
New York 4, N. Y.

RAYMOND J. CANNON, ESQ.,
Clerk of the Court on the Judiciary,
Clerk's Office,
Court of Appeals Hall,
Eagle Street,
Albany 7, N. Y.

Appendix D

Letter from Governor to Chief Judge Desmond —April 16, 1963

(Letterhead of)

NELSON A. ROCKEFELLER
GOVERNOR

April 16, 1963

Dear Chief Judge Desmond:

In communication with Frank S. Hogan, District Attorney of New York County, I have been advised that Judge Melvin H. Osterman, Judge of the Court of Claims, was called to appear yesterday before the Grand Jury of New York for questioning in the Grand Jury's pending inquiry to determine whether violations of the Penal Law have been committed in connection with the administration of the State Liquor Authority. I have been further advised that, when asked to execute a waiver of immunity, Judge Osterman refused to sign a general waiver but stated that he would sign a waiver limited only to the conduct of his judicial office.

Yesterday, by telegram I advised Judge Osterman that in view of his refusal to sign a general waiver of immunity, I was requesting him to resign his judicial office and that if he were not willing to do so, I would be compelled to request you to convene a Court on the Judiciary to take appropriate action under Section 22 of Article 6 of the State Constitution. A copy of my telegram to Judge Osterman is attached.

Appendix D—Letter from Governor to Chief Judge Desmond—April 16, 1963

I have today received a letter from Harris B. Steinberg, Esq., counsel to Judge Osterman, who has advised me, on behalf of Judge Osterman, that Judge Osterman will not resign and rejects my request. A copy of Mr. Steinberg's letter is attached.

In the circumstances, I hereby request you to convene a Court on the Judiciary to take appropriate action under Section 22 of Article 6 of the State Constitution.

Very truly yours,
NELSON A. ROCKEFELLER

The Honorable Charles S. Desmond
Chief Judge of the Court of Appeals
Court of Appeals Hall
Eagle Street
Albany 7, New York
Enclosures 2

Appendix D

Letter from Counsel for Petitioner to Governor —April 16, 1963

(Letterhead of)

HARRIS B. STEINBERG

Counselor at Law

April 16, 1963

Hon. Nelson A. Rockefeller
Executive Chamber
Albany, N.Y.

My dear Governor:

I represent Judge Melvin H. Osterman of the Court of Claims. In yesterday's newspapers I read a report that you had sent a telegram to Judge Osterman, requesting him to resign the judicial office he now holds, because he had failed to sign a waiver of immunity in the form sought by the District Attorney of New York County. Until late this morning, Judge Osterman had not received the telegram referred to, either at his office or at his home. At my request, your counsel's secretary read me the text of the telegram at 11:00 A.M. today. The telegram itself was not delivered until 11:15 A.M. today.

On behalf of Judge Osterman, I wish to advise you that he will not resign, and rejects your request.

His reasons are as follows:

1. Judge Osterman is apparently an object or target of a grand jury inquiry being conducted by the District

Appendix D—Letter from Counsel for Petitioner to Governor—April 16, 1963

Attorney of New York County. The District Attorney saw fit to call the judge before that same grand jury. The decisions of the highest court of this State—the New York Court of Appeals—are quite clear that it is an infringement of the Constitutional rights of a citizen to call him before a grand jury in such circumstances. The only exception to that rule is the provision of Article I, Section 6 of the State Constitution, to the effect that a public officer, questioned in a grand jury inquiry directed toward his official conduct in office, must execute a waiver of immunity with respect to such inquiries, or forfeit his office.

2. Judge Osterman did execute and acknowledge a waiver of immunity which fully complies with all the requirements of the Constitution, and he indicated his complete willingness to answer any questions of the grand jury as to his judicial conduct. The District Attorney's decision not to proceed with the questioning of Judge Osterman in the absence of a complete and general waiver of all his Constitutional rights, is one with which one cannot take issue because only the District Attorney knows, and should know, what his evidence is and what he considers in the public interest.

3. However, I respectfully suggest that it ill becomes the head of one of the three co-ordinate branches of our State government—the Executive—to attempt to bring pressure on a member of another branch—the Judiciary—to resign from the bench, in the absence of clear evidence of wrongdoing as a judge, and absent a hearing and an opportunity to confront his accusers, if

Appendix D—Letter from Counsel for Petitioner to Governor—April 16, 1963

any. Moreover to make such a demand in a telegram released to the press long before it is received by the addressee, smacks more of lynch law than of the reasoned kind of wisdom one hopes for in our elected officials. Finally, the threat of referring this matter to the Court on the Judiciary, unless the Judge resigns, is hard to understand since I am not aware that Judge Osterman's actions with respect to the waiver of immunity constitute any wrongdoing. With respect to his conduct before he ascended the bench, I am sure that your Excelency satisfied himself of the Judge's probity and ability before you appointed him, since you have, and then had, available all the investigative resources of the State Police. At any rate, I am sending a copy of this letter and of your telegram to Chief Judge Desmond, head of the Court on the Judiciary, since no one wishes to conceal from him the nature of this controversy.

4. I should like to remind your Excellency that judges are the most powerless of all public officials to defend themselves from publicized attacks on their integrity, because the Canons of Judicial Ethics prevent their making statements, and it is unbecoming for them to do so. Indeed, it is offensive for anyone to have to withstand attacks spread far and wide in the press. The laws of this State have provided proper forum for the determination of accusations against judges. If a crime is charged in an indictment, one should be able to go to a jury to meet the charge, and statements by highly placed, influential public officers, prejudging the issues,

and assigning guilt before they have heard the evidence, are destructive of the right to fair trial. If misconduct in judicial office is charged, the Court on the Judiciary should be able to decide the issues, on proper evidence, and not be subjected to the "hydraulic pressures" of prejudgment by the Governor.

Respectfully yours,

HARRIS B. STEINBERG

HBS:GL

CC: Hon. Charles S. Desmond
Chief Judge of the Court of Appeals
and of the Court on the Judiciary
Court of Appeals Hall
Eagle Street
Albany, N.Y.

Appendix D

Notice of Cross-Motion

STATE OF NEW YORK
COURT ON THE JUDICIARY

In the Matter of the Proceedings purusant to Section 22 of Article VI of the Constitution of the State of New York in Relation to

MELVIN H. OSTERMAN, Judge of the Court of Claims of the State of New York

---

NOTICE OF CROSS-MOTION

SIRS:

PLEASE TAKE NOTICE that the undersigned will move this Court, at a motion term thereof, to be held at Court of Appeals Hall, Eagle Street, Albany, N. Y., at twelve o'clock noon on September 23, 1963, for an order, pursuant to Rule IX of the Court's Rules, dismissing the charge contained in Paragraph 8(c) of the Charges for Removal, upon the objection in point of law that said charge does not state any cause for removal within the meaning of Article VI, Section 22, of the New York State Constitution, and for such other and further relief as to the Court may seem just and proper.

Dated: September 12, 1963.

Yours, etc.,

HARRIS B. STEINBERG
Attorney for Melvin H. Osterman
Judge of the Court of Claims of
the State of New York
25 Broad Street
New York 4, N. Y.

To:

BRUCE BROMLEY, Esq.
Counsel Designated to Conduct the Proceedings
1 Chase Manhattan Plaza
New York 5, N. Y.

FREDERICK A. O. SCHWARZ, Esq.
Associate Counsel Designated to Conduct
the Proceedings
1 Chase Manhattan Plaza
New York 5, N. Y.

RAYMOND J. CANNON, Esq.
Clerk of the Court on the Judiciary
Clerk's Office, Court of Appeals Hall
Eagle Street
Albany 7, N. Y.

Appendix D

Affidavit in Support of Cross-Motion

COURT ON THE JUDICIARY
STATE OF NEW YORK

In the Matter of the Proceedings pursuant to Section 22 of Article VI of the Constitution of the State of New York in Relation to

MELVIN H. OSTERMAN, Judge of the Court of Claims of State of New York.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

AFFIDAVIT IN SUPPORT OF CROSS-MOTION

HARRIS B. STEINBERG, being duly sworn, says:

1. I am the attorney for Judge Melvin H. Osterman, Judge of the Court of Claims of the State of New York, and I make this affidavit in support of the foregoing notice of motion upon information and belief, the source of my information being public documents, statements by my client to me, and statements of other persons. The matters contained in Paragraph 5 hereof are within my own knowledge.

2. Judge Osterman was duly named to the office of Judge of the Court of Claims by the Governor of this State, on July 11, 1961. Thereafter, on or about January 11, 1962, by virtue of the action of the Senate of New York State, his appointment was confirmed, he took the neces-

sary oath of office, and he duly and regularly qualified in all respects for the office of Judge of the Court of Claims, and began to serve a term of ten years, as provided in the applicable provisions of the New York State Constitution and pertinent statutes. From in or about July 1961, to in or about April 1963, Judge Osterman duly, regularly and properly performed his duties as a Judge of the Court of Claims. During this period he has been, and is, a member of the New York State Employees' Retirement System, and his pension rights, which are valuable and important, are fixed by Constitution, statute and various applicable rules and regulations. By virtue of the Constitution of the United States, the judge's status in his public office and his pension rights are protected from arbitrary and illegal infringement.

3. On information and belief, the District Attorney of New York County, by his Chief Assistant, Alfred J. Scotti, Esq., and other assistants, for some time past, has been conducting an investigation before a Grand Jury of New York County, into alleged acts of corruption and criminal conspiracy by various persons in connection with matters pertaining to the State Liquor Authority. Said investigation is continuing, and is expected to continue, and has resulted in several indictments. Among the matters being investigated are the activities of certain lawyers who have practiced before the State Liquor Authority. Mr. Scotti and his assistants are now, and for some months past, have been endeavoring to indict the judge for alleged criminal acts on his part, claimed to have been committed prior to Judge Osterman's ascending the bench of the Court of Claims. To this end, Mr. Scotti has caused books and re-

cords of banks, brokerage companies and others, reflecting transactions of the respondent, and of persons close to him, such as members of his family, and former business and professional associates, to be subpoenaed, and he has subpoenaed and questioned the judge's secretary, his law clerk, and numerous other persons. Indeed, Mr. Scotti has clearly stated to the judge that he considers the latter a prospective indictee and a target of his investigation. Judge Osterman denies any wrongdoing, but believes that he may be in jeopardy, depending upon what evidence the District Attorney and the Grand Jury receive and choose to believe, and accordingly he desires to avail himself of the well-established constitutional and procedural rights which are properly his, by virtue of the applicable Federal and State Constitutional and statutory provisions.

4. In or about March 1963, Mr. Scotti called Judge Osterman to his office, and Judge Osterman, without the compulsion of any legal process, and with no lawyer representing him, went there. Mr. Scotti questioned Judge Osterman about certain matters involving the State Liquor Authority. He said that if he were met with denials or refusals to answer, he would call the judge before the Grand Jury. He threatened him with an indictment for perjury, and indicated disbelief of what the judge told him. He said that he would call Judge Osterman before the Grand Jury, and ask him to sign a full and general waiver of his constitutional rights not to be required to be a witness against himself. Mr. Scotti told Judge Osterman that, as a judge, he could only be required to sign a limited waiver of immunity but in view of his position, he would have to sign a

general one. The inference left with the judge was that Mr. Scotti was letting him know that he felt that in view of the judge's public position, it would be inappropriate for him to refuse to sign such a general waiver. An appointment was made (without the service of any subpoena) for Judge Osterman to appear before the New York County Grand Jury.

5. Thereafter, Judge Osterman consulted and retained the affiant to represent him. I telephoned to Mr. Scotti, and apprised him of the fact that I would represent the judge, and that I had advised him that he was within his rights to refuse to sign a general waiver of privilege and immunity, and that, relying upon my advice, the judge would sign only a limited waiver, waiving all his constitutional rights against self-incrimination with reference to the performance of his judicial duties, as required by the State Constitution. Mr. Scotti said that this would not be satisfactory; that he was not concerned with Judge Osterman's conduct as a judge, and that he insisted on the judge's appearance as originally appointed. I informed him that I would bring the judge to the Grand Jury, as he wished.

6. On April 15, 1963, I accompanied Judge Osterman to the Grand Jury. Inside the jury room, Mr. Scotti questioned him in my absence. I am informed by Judge Osterman that he offered to Mr. Scotti the original of a signed and acknowledged waiver of immunity limited to inquiries as to his conduct in office as a judge. I had prepared this waiver, and had witnessed its execution; a copy thereof is contained in the Appendix at pages 11 and 12. Judge Osterman refused to sign a general waiver of immunity.

Thereupon, the judge was excused. Upon information and belief, the Governor of New York State became aware of the foregoing.

7. On April 15, 1963, Governor Rockefeller sent to Judge Osterman a telegram which contained the following:

> "In view of your refusal to sign a general waiver of immunity, I hereby request you to resign your judicial office. If you are not willing to do so, I will be compelled to request the Chief Judge of the Court of Appeals to convene a court on the judiciary to take appropriate action under Section 22 of Article VI of the State Constitution."

8. Upon receipt of the telegram, the judge, through his attorney, replied that he felt he had fulfilled all of his legal obligations with respect to waiving immunity, and that it was unfair and improper (a) to prejudge the judge's probity or guilt; (b) to require him, as a prospective target of a Grand Jury inquiry, to immolate himself or to give up his rights; (c) to subject him to publicized criticism in the very community where he would have to stand trial if indicted, and before the very citizenry who would act as jurors on the trial of a charge of crime. The Governor's demand for a resignation, backed by a threat of convening this Court, was rejected. A copy of the letter is set forth in the Appendix, at pages 17 to 20, inclusive.

9. Thereafter, the judge applied for, and was granted, a leave of absence, to enable the present proceedings to be brought and completed without possible embarrassment to the public or to litigants and lawyers in the Court of Claims, which might arise from the circumstance of a judge under

charges performing his official duties. The judge's salary is being held in escrow by Hon. Bruce Bromley, pending the outcome of the charges. Since the granting of the leave of absence, the judge has not performed any of his official duties.

10. From that time forward, to and including the present time, and before and after the filing of the Charges for Removal herein, Mr. Scotti has continued unabated his investigation into the conduct and activities of Judge Osterman, with a view toward obtaining an indictment against him.

11. It is beyond question that Judge Osterman, (a) when he was first called to Mr. Scotti's office in March 1963; (b) when he appeared before the Grand Jury in April 1963; (c) when the Charges for Removal were formulated and filed in May 1963; and (d) presently, and for the foreseeable future, indeed, (e) until the expiration of the applicable Statute of Limitations, or some other dispositive event, has been, now is, and will continue to be in jeopardy of indictment, and he has real and substantial cause to consider himself as one who is threatened by criminal proceedings in which he may be a defendant.

WHEREFORE, it is respectfully prayed that this Court make an order granting the present cross-motion, and denying the motion for judgment of removal.

(Signed and sworn to by Harris B. Steinberg on September 12, 1963.)

Appendix D

Affidavit of Alfred J. Scotti

STATE OF NEW YORK

COURT ON THE JUDICIARY

In the Matter of the Proceedings pursuant to Section 22 of Article VI of the Constitution of the State of New York in Relation to

MELVIN H. OSTERMAN, Judge of the Court of Claims of the State of New York.

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALFRED J. SCOTTI, being duly sworn deposes and says:

1. I am the Chief Assistant District Attorney of New York County, and for some time I have been conducting a grand jury investigation to determine whether crimes have been committed in connection with the administration of the New York State Liquor Authority.

2. In connection with that investigation, information had been developed which made it necessary for me to question Melvin H. Osterman about his relationship with the Chairman of the State Liquor Authority, particularly during the summer of 1962.

3. On March 26, 1963, I met with Melvin H. Osterman in my office for approximately 40 minutes. During that time I questioned him concerning his activities during the summer of 1962 and specifically asked him whether he had discussed in July 1962 with Martin C. Epstein, the then Chairman of the State Liquor Authority, a matter involving the Bermuda Sales Corporation. I made clear to him that it was my intention to question him about this matter before the grand jury should he waive immunity. It was evident from my discussion with him that he knew I was primarily interested in his activities on behalf of liquor licensees while he was a judge of the Court of Claims.

(Signed and sworn to by Alfred J. Scotti on September 17, 1963.)

Office-Supreme Court, U.S.
FILED
JAN 10 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 657

MELVIN H. OSTERMAN,

Petitioner,

v.

COURT ON THE JUDICIARY OF THE STATE OF NEW YORK; BY BRUCE BROMLEY, ESQ., COUNSEL DESIGNATED BY SAID COURT TO CONDUCT THE PROCEEDINGS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT ON THE JUDICIARY OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENT IN OPPOSITION

January 10, 1964.

BRUCE BROMLEY
Counsel for respondent,
1 Chase Manhattan Plaza,
New York 5, N. Y.

FREDERICK A. O. SCHWARZ, JR.,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

MELVIN H. OSTERMAN, *Petitioner*, v. COURT ON THE JUDICIARY OF THE STATE OF NEW YORK, BY BRUCE BROMLEY, ESQ., COUNSEL DESIGNATED BY SAID COURT TO CONDUCT THE PROCEEDINGS, *Respondent*.	No. 657

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT ON THE JUDICIARY OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

New York's Court on the Judiciary—a special court composed of judges and justices selected from New York's five highest courts which is given power to pass upon the fitness for further service of members of New York's judiciary—has unanimously construed the Constitution of the State of New York to support its order removing petitioner Melvin H. Osterman from his position on the New York Court of Claims for insisting upon personal immunity as a condition to disclosing what he knew about corruption in the state government to a state grand jury which was concededly investigating such corruption in good faith. The question presented is whether the Court on the Judiciary's

order removing petitioner from the bench violates the Constitution of the United States.

STATEMENT OF THE CASE

The Court on the Judiciary's only function is to consider whether judges should be removed or disciplined or retired.* (Constitution of the State of New York, Article VI, Section 22.) The Court was created by constitutional amendment in 1948 as an addition to provisions of the New York State Constitution which empowered (and in Sections 23 and 24 of Article VI of the New York Constitution still empower) the legislature or the legislature in conjunction with certain judges to remove judges from office. The Court on the Judiciary's power is patterned upon the legislative removal sections of the New York Constitution in that it can only remove a judge for "cause" (compare Section 23) and at least a two-thirds majority is required for a removal to be effectuated (compare Sections 23 and 24).

* * *

Petitioner was given a recess appointment to the Court of Claims by the Governor of the State of New York on July 11, 1961, and in January 1962 the State Senate consented to his appointment for a full nine-year term to expire on July 11, 1970. (Charges for Removal, para. 1, App. 30; Admitted: Answer, para. 1, App. 42.**)

On March 26, 1963, petitioner at Mr. Scotti's request went to the office of Alfred J. Scotti, the Chief Assistant

*It is composed anew on each occasion that it is convened. Its membership consists of the Chief Judge and the Senior Associate Judge of the Court of Appeals and of a justice chosen from each of the four departments of the Appellate Division by a majority of his fellow justices.

**Appendix references are to the pages at the end of the petition.

District Attorney of New York County, who was conducting a grand jury investigation to determine whether crimes had been committed in connection with the administration of the New York State Liquor Authority. In answer to Mr. Scotti's questions, petitioner stated that he had practiced law in relation to State Liquor Authority matters before becoming a judge but denied that he had continued to deal with State Liquor Authority matters after his accession to the bench. He specifically denied that in July 1962 —a year after his accession to the bench—he had discussed with the then Chairman of the State Liquor Authority, Martin C. Epstein, the difficulties the Bermuda Sales Corporation was having with the State Liquor Authority with respect to its New York City liquor store license. Mr. Scotti thereupon told petitioner that there was information to contradict petitioner's denials and asked him to appear before the grand jury investigating the State Liquor Authority. (Charges for Removal, paras. 4 and 5, App. 37; Admitted: Answer, para. 1, App. 42.)

On April 15, 1963, petitioner appeared, not pursuant to a subpoena, before a quorum of a New York County grand jury. Mr. Scotti told petitioner that he had been requested to appear before the grand jury "in connection with an investigation to determine whether there was in existence a conspiracy to commit the crimes of bribery of a public officer attached to the State Liquor Authority." (Charges for Removal, para. 6, App. 38; Admitted: Answer, para. 1, App. 42; Transcript of proceedings before grand jury, App. 45-46.) At the oral argument below it was conceded that "the grand jury . . . and the prosecutor were in good faith investigating into alleged public corruption related to the State Liquor Authority, that they sought in good faith to question the Judge in connection with that inquiry" and that petitioner knew that the information

sought from him related to his knowledge of public corruption during the period that he was a judge. (Opinion, App. 23-24.)

When petitioner appeared, Mr. Scotti asked him to sign a general waiver of immunity prior to being questioned before the grand jury. Without such a general waiver, petitioner—if found after the event to have been one of the targets of the grand jury investigation—would have become immune from indictment by the grand jury and would have been entitled to have excluded from any criminal prosecution that might be brought against him any incriminating information that he might supply to the grand jury and any leads derived from it. *People* v. *Laino*, 10 N. Y. 2d 161, 176 N. E. 2d 571 (1961); *People* v. *Stending*, 6 N. Y. 2d 214, 160 N. E. 2d 488 (1959). Petitioner refused to sign a general waiver of immunity and stated that he was only willing to sign a waiver with respect to questions that involved the performance of his judicial duties as he was required to do by Section 6 of Article 1 of the Constitution of the State of New York if the inquiry related to the performance of his judicial duties which he knew it did not. (Opinion, App. 23-24, Concurring Opinion, App. 28.) Mr. Scotti then repeated, however, that he wanted to question the judge about a conspiracy to bribe a State Liquor Authority official and said that he did not want to question him about the performance of his judicial duties. When petitioner persisted in his refusal to sign a general waiver of immunity, he was excused by Mr. Scotti. (Charges for Removal, para. 6, App. 38; Admitted: Answer, para. 1, App. 42; Transcript, App. 46, 47, 48.)

On April 16, 1963, after petitioner, through his counsel, had refused a request that he resign made by the Governor of the State of New York, the Governor made

a written request, pursuant to Section 22 of Article VI of the New York Constitution, to the Chief Judge of the Court of Appeals to convene a Court on the Judiciary to consider whether petitioner should be removed. (App. 53-56 and 51-52.) The court was accordingly convened.

Charges for removal were filed on May 25, 1963 by the undersigned, who had been designated as counsel to conduct the proceeding. The charges for removal included three allegations of cause for removal in addition to the one based upon petitioner's refusal to sign a general waiver of immunity.* By agreement between the parties, approved by the Court on the Judiciary, the initial hearing was, however, based solely upon the charge that a judge should not condition his cooperation with a grand jury investigation of official corruption upon an assurance that any information that he might give about official corruption not be used against him. Since the court below held that the admitted facts with respect to that charge constituted cause for removal, there was no need for further proceedings with respect to the three other charges.

On November 7, 1963, petitioner was arraigned in the Supreme Court, New York County, on a six-count indictment charging bribery and conspiracy to bribe State Liquor Authority officials during the period that petitioner was on the bench. Petitioner pleaded not guilty. Trial is scheduled to begin on March 2, 1964.

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*The additional allegations were (1) that petitioner had practiced law after becoming a judge in violation of the statutory prohibition against his doing so contained in the New York Court of Claims Act, (2) that he had failed to tell the truth to the Chief Assistant District Attorney of New York County, who had been authorized to investigate the State Liquor Authority, when he denied that he had continued to deal with State Liquor Authority matters after becoming a judge and (3) that he had attempted to obstruct said investigation by removing from his office and hiding a typewriter which he knew to be relevant to said investigation. (Charges for Removal, paras. 3, 4, 7 and 8(a), (b) and (d), App. 36-40.)

ARGUMENT

A. Exercising its power to oversee the conduct of the judiciary, New York's Court on the Judiciary unanimously concluded that by insisting upon personal immunity as a condition to disclosing what he knew about official corruption, petitioner had breached his special duty as a judge and should therefore be removed from his special position as a judge. That decision was permissible under the Constitution of the United States as it has been several times construed by this court. *Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960); *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Beilan* v. *Board of Educ.*, 357 U. S. 399 (1958); *Cohen* v. *Hurley*, 366 U. S. 117 (1961).

But were the Court disposed to re-examine the cases just cited and later discussed, this case would not be an appropriate occasion on which to do so. Because of the nature of the inquiry, the nature of the inquiring body and, most important, because of the nature of the position from which petitioner was removed, the decision below was consistent with the Constitution and can stand alone without the support of this Court's precedents from which the decision below followed *a fortiori*. New York acted constitutionally in ensuring that its judiciary retain public confidence and consist of persons who put aside considerations of personal risk in order to help keep its government clean and its judiciary above suspicion.

Three of the four decisions referred to above—*Lerner*, *Nelson* and *Beilan*—involved the removal from office of public employees who had asserted their constitutional privilege when asked if they were members of the Communist Party and similar questions involving their associations and beliefs. This Court affirmed state court decisions upholding the removal of, respectively, a New York City Transit Authority subway conductor who insisted upon immunity be-

fore the New York City Commissioner of Investigations, a temporary employee of the Los Angeles County Department of Charities who insisted upon immunity before a committee of Congress, and a Philadelphia school teacher whose refusals occurred before officials of the city school system and a committee of Congress (though it was disputed whether the latter refusal played a part in the removal decision).

If minor public employees such as a subway conductor or an employee of a county department of charities can be removed from their public positions surely a judge from whom so much more is expected and whose function is to enforce the law can be removed from his public and privileged position for placing a condition upon his willingness to tell what he knows about corruption in his government.*

*Petitioner says that *Lerner*, *Nelson* and *Beilan* stand for the proposition that "a state may constitutionally discipline a public employee for refusing to answer questions relevant to his employment even though the refusal is based upon his privilege against self-incrimination" and then seeks to distinguish away those cases by stating (1) that petitioner "did not refuse to answer a single question" and (2) that the inquiry did not relate to petitioner's "position on the bench". (Petition, pp. 11-12.) The first purported distinction is irrelevant under the circumstances and the second represents an inaccurate reading of the facts.

Petitioner's refusal to sign a general waiver of immunity with respect to a grand jury inquiry that concededly was concerned with alleged public corruption is precisely the same as a refusal to answer a question or a series of questions about corruption upon the ground that the answer might be incriminating. The legal effect of assertion of the privilege in response to a question is to insist that immunity be granted. If immunity is granted, testimony must be given, since with immunity granted there is no reason to fear self-incrimination and the privilege of silence therefore lapses. *Ullmann* v. *United States*, 350 U. S. 422 (1956); *Brown* v. *Walker*, 161 U. S. 591 (1896). The one who refuses to waive his immunity says directly what the one who asserts the privilege says in legal effect—*i.e.*, that immunity must be granted if he testifies.

The facts with which Mr. Scotti and the grand jury were concerned were highly relevant to petitioner's fitness for the bench—

The inquiry in this case, moreover, was about corruption, not about political associations or belief. Accordingly, there is no first amendment issue here as there was in those earlier cases that the Court affirmed. Contrary to a future effect of the decisions in *Lerner*, *Nelson* and *Beilan*, the decision below if left standing cannot be said to deter the free association upon which a democracy depends or any other desirable conduct. To the contrary, official corruption—their knowledge of which judges in New York have been told they must willingly disclose if they want to remain on the bench—is condemned by the criminal law and is unquestionably a threat to good government.

In *Cohen* v. *Hurley*, 366 U. S. 117 (1961), this Court affirmed New York's disbarment of a lawyer who had refused, on the ground that the answers might incriminate him, to answer questions at an inquiry into the illegal and unethical practices of lawyers. Again the decision below follows *a fortiori* from the earlier decision of this Court. Surely it would not make sense to say that a lawyer was unfit to practice before the court because of conduct which the court itself could engage in with impunity.* Here,

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though, as in *Lerner*, *Nelson* and *Beilan*, the grand jury was not inquiring into his specific duties. A judge's fitness for the bench depends upon more than the way in which he performs his official duties. Lack of fitness for the bench is shown by the refusal to give information concerning corruption to the grand jury without being assured of personal immunity.

*Petitioner points out that the grand jury did not have power to remove or discipline him as a judge, whereas the inquiry in *Cohen* was sponsored by the Appellate Division which did have power to discipline Cohen as a lawyer. But in *Lerner* and *Nelson* similarly the City Commissioner of Investigations and the House Un-American Activities Committee lacked power to remove or discipline the subway conductor and county welfare workers involved in those cases. Furthermore, the suggestion that a grand jury investigation of official corruption is somehow of lesser significance than the investigations of other bodies cannot be accepted. To the contrary, a grand jury

moreover, New York has confined its action to removing a limited-tenure public official from his state office whereas in *Cohen* a private citizen was banned from practicing his life-long profession.

Thus, whatever one thinks of the cases decided by this Court from which the constitutionality of the removal of petitioner from the bench follows *a fortiori*, the Constitution should not be read to prohibit New York from removing a judge who insists upon personal immunity when asked to testify about official corruption. Such matters as the special burdens and responsibility of judges are matters of ethical judgment rather than legal analysis and undoubtedly are felt most strongly by those who themselves sit on the bench. This Court should not disturb the decision with respect to the standards that must be met by New York's judiciary that has been unanimously made by judges and justices from each of New York's five highest courts.

B. As a man with a special position a judge has special responsibilities. A judge's duty to cooperate with efforts to ensure clean government and attempts to ferret out corruption in the government for which he works and which he at the same time judges cannot be doubted.

Petitioner was asked to testify concerning corruption in the state government. Nothing is more certain than that a judge should cooperate with such an inquiry even if he takes a personal risk in doing so. Corruption and suspicion of corruption subvert all government and are particularly dangerous threats to the judiciary.

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is a body to which judges owe a duty of cooperation greater than to other bodies. Both judge and grand jury are part of the machinery of justice, and judges' supervisory authority over grand juries will surely be weakened if they refuse to assist a grand jury by giving it information unless assured that the information will not be used against them.

Support for the judiciary depends in large measure upon the judges' reputation for candor and honesty. That support will be seriously undermined if judges refuse to tell what they know about official corruption unless given assurance that they will not personally be prosecuted.

It is not unreasonable or unfair to require judges, if they wish to remain on the bench, to make disclosures which as private citizens they could not be required to make unless assured of personal immunity. Disclosure can be required not of their opinions or beliefs or of personal matters but of matters of public concern the obtaining of information about which is vital to good government and the willing and unconditional disclosure of which is vital to public confidence in the judiciary. To hold judges to higher standards than ordinary citizens or even other public officials is wholly proper.* Refusal to testify about official corruption without an assurance of personal immunity is incompatible with the standards to which the judiciary should be held.

Assertion of the right to withhold incriminating information unless immunity is guaranteed gives rise to a legitimate suspicion of guilt, at least in cases where belief is not involved. Action should not be (and was not below) based upon a conclusion that a judge who refuses to answer questions about official corruption without being assured of immunity is in fact guilty of corruption. For an innocent man may fear that his answers will incriminate himself—though such fear is probably less likely for a judge who presumably can better than most people avoid confused explanations, put forward the favorable inferences and ensure that all the facts are placed upon the record.

*Whatever one may think, for example, about the constitutionality of a ban upon partisan political activity by employees of the executive branch, industrial as well as administrative, is it not clear that it is constitutional to prohibit judges from engaging in partisan politics?

But even though the inference of guilt from insistence upon immunity when asked to testify about corruption is not compelling and may be erroneous in some cases, the insistence does give rise to a legitimate suspicion.* The fact that the suspicion will not, if all is known, prove to be justified in every case does not invalidate the conclusion that the suspicion does arise in all cases.

It should not be held that it is unconstitutional for New York to say to its judges that they should be above suspicion and beyond reproach. The Canons of Judicial Ethics, which are filled with injunctions to avoid suspicion and be beyond reproach, see Canons 4, 13, 25, 26, 28, 30, 31 and 33, are illustrative of the principle that judges, whatever the true facts may be, must avoid action which is suspicious.

Of course, it is conceivable that an innocent man might open the door to his prosecution, and even conviction, if he answered questions about official corruption without obtaining immunity. But a judge must take that risk in order to help the public in efforts to keep its government clean, as a good judge must risk his personal popularity when it is just to make an "unpopular" decision. As a man with a special position a judge has special duties.

In becoming a judge a man undertakes a heavy burden. New York should not be prevented from ousting from its

*It does not denigrate the values underlying the privilege against self-incrimination to say that claiming the privilege does give rise to a suspicion of guilt at least where the inquiry does not involve belief. See Griswold, *The Fifth Amendment Today* (Harvard University Press, Cambridge, 1955), 58-59. It is correct that the bar and the bench should defend the privilege against those "who wrongly conceive of it as merely a shield for the guilty", *Quinn* v. *United States*, 349 U. S. 155, 164 (1955). But to say that it is wrong for elements of the public to assume that every man who relies upon the privilege is guilty and to take steps to correct that impression does not warrant overreacting to the public view by denying that it is suspicious to insist upon immunity from prosecution when asked a question about matters like official corruption.

judiciary a judge who has put a price—the price of personal immunity—upon his testifying concerning corruption in the state government.

C. Contrary to petitioner's assertion (Petition, pp. 18-19), the grant of certiorari in *Murphy v. Waterfront Comm'n of N. Y. Harbor*, *cert. granted*, 375 U. S. 812 (1963),* does not support the grant of certiorari in this case. This case is substantially different from *Murphy*. In the first place, petitioner was a judge whereas the individuals involved in *Murphy* were private citizens, and petitioner was removed from the bench whereas they were held in contempt and ordered to stay in jail until they talked. The difference in the positions of the individuals involved, in their duties and responsibilities, and the difference in the action taken by the two states are enough to make the action taken below reasonable and constitutional even if the action taken in *Murphy* is held to be unreasonable and unconstitutional. Secondly, it seems clear that the contention that petitioner might have given answers that would have exposed him to federal prosecution has been raised as an afterthought for the purpose of aiding in the effort to obtain certiorari. It was not mentioned below.

In addition to his main claim that his removal from the bench for refusing to waive his immunity when asked to testify about official corruption was impermissible under the Constitution of the United States, petitioner claims that he was denied the procedural rights due to him under that Constitution. He was not. The procedure below met the standards of the fourteenth amendment. It was fair.

Petitioner claims (1) that he was not (a) fully apprised of the charges and evidence against him, (b) per-

*For the state court opinion in *Murphy* see *Application of the Waterfront Comm'n of N. Y. Harbor*, 39 N. J. 430, 189 A. 2d 36 (1963).

mitted to confront and cross-examine witnesses, and (c) permitted to offer evidence in explanation, rebuttal or mitigation, and (2) that he was not given either fair warning that his "refusal to testify" would result in removal or a "chance to comply" before removal was adjudged. (Petition, pp. 16-17.)* Those contentions are without merit. None of them, moreover, was raised below.

Petitioner was fully apprised of the charges against him by virtue of the charges which were served upon him.**

*In addition, petitioner contends (Petition, pp. 17-18) that the Court on the Judiciary failed to afford him the equal protection of the laws in that it failed to apply to him two "well recognized" rules of New York State Law. Apart from the fact that without intentional or purposeful discrimination mis-application of state law does not give rise to a federal question, *Snowden* v. *Hughes*, 321 U. S. 1, 7-13 (1944), petitioner has misconceived the law of New York to which he refers. It is not the New York rule that the rights of a possible target of a grand jury investigation are "grossly impaired and violated" if he is called as a witness, sworn and asked questions. (Of course even if it were, the transcript of petitioner's appearance shows that he was neither sworn nor asked questions (App. 45-48) and petitioner's answer admits that he was not subpoenaed.) The rule is, rather, that if such a person is questioned without having signed a waiver of immunity, the grand jury is prohibited from indicting him and the government is prohibited from using against him any incriminating information that he may give. The assertion that petitioner's rights were violated by the act of asking him to testify begs the very question that was at issue before the state court—whether a judge to remain a judge must tell what he knows about official corruption without placing a condition upon his willingness to testify. Similarly, the New York rule referred to by petitioner in the first full paragraph of page 18 of the Petition is inapplicable to this case; it refers to holding an individual in contempt, not to removal from office. Cf. *Matter of Cohen*, 7 N. Y. 2d 488, 166 N. E. 2d 672 (1960); *Matter of Lerner* v. *Casey*, 2 N. Y. 2d 355, 141 N. E. 2d 533 (1957). If there was any question about the rules of state law before the decision below—which there was not—the rules were, moreover, resolved against petitioner by the decision below.

**Petitioner's claim that he was not fully apprised of the charges against him is belied by the fact that he did not move for a "more definite and certain statement or for particularization in any respect", as he was entitled to do under Rule IX of the Rules of the Court on the Judiciary.

(App. 36-40, 41.) Whether or not his refusal to waive his immunity constituted cause for removal raised a pure question of law. By virtue of his answer—which admitted the facts relevant to the waiver question but contended that those admitted facts did not constitute cause for removal—and the stipulation that the transcript of petitioner's appearance before the grand jury was accurate, evidence as to the underlying facts relevant to the charge upon which the court below acted was agreed upon by petitioner and placed upon the record. (App. 42, 43.)

Since the court below was presented with a pure question of law based upon admitted facts there was no reason for witnesses to appear so that they could be confronted and cross-examined. Petitioner, moreover, did not even suggest below that he would want to call, confront, examine or cross-examine a single witness.

Petitioner's claim that he was improperly denied an opportunity for explanation, rebuttal or mitigation, falls along with his claim that he was denied due process in that he was not given either fair warning that his "refusal to testify" would result in removal or a chance to comply before being removed. In the first place, such arguments were not made either in petitioner's counsel's letter to the Governor refusing the Governor's request that petitioner resign or in the court below. Considerations of federalism and the proper workings of a judicial system mean that this Court should not consider constitutional arguments raised for the first time in this Court which could have been raised in the state court below.*

*Had such arguments been raised, moreover, the undersigned would have had cause to introduce contradictory evidence, such as the fact that high state officials removable at will by the Governor had shortly prior to petitioner's appearance before the grand jury lost their jobs because they refused to waive their immunity when asked to testify before the same grand jury about corruption in the State Liquor Authority.

Secondly, petitioner in fact was warned. Apart from the impression left after his interview with Mr. Scotti three weeks prior to his grand jury appearance (App. 62), petitioner certainly was warned after the Governor asked that a Court on the Judiciary be convened and charges for removal were served upon him. Yet he did not then ask to offer any evidence in explanation, mitigation or rebuttal, or claim that he had not been warned, or suggest that if the Court on the Judiciary found that he had a duty to talk freely about official corruption his removal be made conditional upon his failing to offer to waive his immunity within a given period.*

Finally, one sensitive to the special responsibilities of judges and knowledgeable about cases decided by New York's highest court and by this Court—as a judge must be held to have been—cannot be said not to have realized that refusal by a judge to waive his immunity when asked to testify about official corruption would be regarded as improper by his brother judges.

CONCLUSION

The decision below did not violate the Constitution. It follows *a fortiori* from four recent decisions of this Court. But its does not raise the first amendment questions involved in three of those cases or the question of discrimination against a group of private citizens involved in the fourth case.

The decision of New York's Court on the Judiciary rests upon the premises that judges must avoid suspicion and be beyond reproach and must be willing to take personal risks

*Nowhere in his petition or elsewhere, moreover, has petitioner suggested that he would in fact waive his immunity if told that doing so would restore him to the bench.

in order to aid good faith inquiries into official corruption and upon the conclusion that if they refuse to meet the high standards to which the judiciary is held they can be removed from their remote and exalted positions on the bench. Neither the premises nor the conclusion calls for review by this Court.

January 10, 1964.

Respectfully submitted,

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